

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
ZELLER’S MASTER TIRE, INC.)	
4951 W. LLOYD EXPRESSWAY)	PERMIT NO. DL82-20727
EVANSVILLE, INDIANA 47712)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Applicant, Zeller’s Master Tire, Inc. (“Applicant”), located at 4951 West Lloyd Expressway, Evansville, Indiana, permit number DL82-20727, filed its application for a Type 104 Alcohol and Tobacco Commission ("Commission" or “ATC”) permit. The application was assigned for investigation and review by the Vanderburgh County Local Alcoholic Beverage Board (“Local Board”) and heard on December 8, 2003. The Local Board voted to continue the hearing and to hear additional testimony at its December 22, 2003 hearing. At that hearing, the Local Board voted 2-2 on the application.

On February 3, 2004, the Commission remanded the application to the Local Board for reinvestigation and hearing on the need for such a permit at that location. The Local Board held hearings on the application and on April 26, 2004, the Local Board voted 3-1 in favor of the Applicant. On May 18, 2004, the Commission voted to adopt the recommendation of the Local Board and granted a provisional permit to the Applicant.

Remonstrators filed their Petitions for Intervention as Remonstrator, Objections to Commission’s Action and Request for Appeal Hearing (“Petitions for Intervention”) and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing (“ATC Hearing”) on April 25, 2005, and at that time, witnesses were sworn

and evidence was heard. The matter was taken under advisement.

On August 2, 2005, The Hearing Judge, on her own motion, stayed this matter pending resolution of the *Ind. Ass'n of Beverage Retailers, Inc. v. Ind. Alcohol & Tobacco Comm'n*, 836 N.E.2d 255 (Ind. 2005), finding that the issue of standing had a direct bearing on this matter.

This Hearing Judge, having reviewed the tape-recorded transcript, transcript of the Local Board hearing, the evidence submitted to the Commission during the appeal hearing, contents of the entire Commission file, and the evidence submitted subsequent to the appeal hearing, now tenders her Proposed Findings of Fact and Conclusions of Law with the recommendation that they be adopted and approved by the members of the Commission.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Applicant, Zeller's Master Tire, Inc. ("Applicant"), an Indiana corporation whose principal place of business is located at 4953 West Lloyd Expressway, Evansville, Vanderburgh County, Indiana, permit number DL82-20727, is the applicant for a Type 104 ATC permit. (ATC Records).
2. On or about December 22, 2003, the Local Board voted 2-2 with respect to this permit. (ATC Records; Local Board Hearing).
3. On February 3, 2004, the Commission remanded the matter to the Local Board for reinvestigation with instruction that the "local board should determine need or desire in community and come to a consensus on this issue." (ATC Records).
4. The Local Board reheard the application on April 12, 2004 and April 26, 2004 and on April 26, 2004, the Local Board voted 3-1 in favor of this permit. Although the Local Board initially voted 2 in favor, 1 against, and 1 abstaining, prior to the end of the meeting and while still on record, the Local board member who had previously abstained from voting changed his

vote, making the final vote 3-1 in favor of the Applicant. (Local Board Hearing).

5. The Local Board's April 26, 2004 hearing was properly conducted in accordance with Indiana Code 7.1 and 905 Indiana Administrative Code.

6. On May 18, 2004, the Commission voted to adopt the recommendation of the Local Board and granted a provisional permit to the Applicant. (ATC Records).

7. The Hearing Judge took judicial notice of the entire Commission file, including but not limited to, the Local Board transcript, the ATC file, and the permit application. (ATC Hearing).

8. On or about June 4, 2004, the following individuals timely filed their Petitions for Intervention: Billie J. Gonterman ("Gonterman"); Melbern M. Borst ("Borst"); Cindy Brackett ("C. Brackett"); June Beldon Jones ("Jones"); Kenneth C. Shoup ("Shoup"); Robert D. Rogge ("Rogge"); William Brackett ("W. Brackett"); Michael H. Eppler ("Eppler"); Jenny Kormelink ("Kormelink"); Mamie Leggett ("Leggett"); Robert L. Jarrett ("Jarrett"); Heath Rupp ("Rupp"); Keith Traphagem ("Traphagem"); Steve Bagbey ("Bagbey"); Fred Padgett ("Padgett"); Fred Miller ("Miller"); Kirk Newman ("Newman"); Mark Nance ("Nance"); Deloris Koch ("Koch"); Jackie Williams ("Williams"); Niki Angelabi ("Angelabi"); Dee Lewis ("Lewis"); Vicki Wright ("Wright"); Jennifer Hall ("Hall"); Donna Lilly ("Lilly"); and Michael Lockard ("Lockard"). (ATC Records).

9. Gonterman, Borst, C. Brackett, Jones, Koch, Williams, Angelabi, Lewis, Wright, Hall, and Lilly did not appear before the Local Board. (ATC Files; Local Board Transcript). As such, they are not considered "remonstrators" before the Commission. 905 IAC 1-36-2(a).

("Remonstrator means a person who appeared personally or by counsel, as a remonstrator against the application at the local board hearing and identified himself to the local board, stating his name and address or telephone number to the board at the hearing.")

10. Pursuant to 905 IAC 1-36-2(b), “absent exigent circumstances, the commission shall deny the petition for intervention of any person who did not appear personally or by counsel at the local board hearing.” Gonterman, Borst, C. Brackett, Jones, Koch, Williams, Angelabi, Lewis, Wright, Hall, and Lilly have filed identical Petitions for Intervention and identically stated that “[r]emonstrator was unable to be present at the Local Board hearing due to exigent circumstances, but desires to intervene and object at this time.” (Petitions for Intervention of Gonterman, Borst, C. Brackett, Jones, Koch, Williams, Angelabi, Lewis, Wright, Hall, and Lilly, collectively at p.2). However, they have failed to explain to the Commission what “exigent circumstances” have prevented them from appearing before the Local Board. (*Id.*). Therefore, Petitions for Intervention of Gonterman, Borst, C. Brackett, Jones, Koch, Williams, Angelabi, Lewis, Wright, Hall, and Lilly are denied for failing to state reasons as to why they should be permitted to intervene.

11. Shoup, W. Brackett, Koremelink, Leggett, Jarrett, Traphagem, Miller, Newman, and Nance are would-be competitors of the Applicant as they are owners of package liquor stores in Evansville vicinity:

- a. Shoup - Beverage Shoppe, Inc;
- b. W. Brackett – Shamrock Package Liquor;
- c. Koremelink - Liquor Barn;
- d. Leggett - KWIK Liquors;
- e. Jarrett - Thrifty Liquors;
- f. Traphagem - Westside Liquor;
- g. Miller, owner - University Liquor Store;
- h. Newman - Liquor Locker; and
- i. Nance - Mr. Liquor.

(ATC Records). As such, they lack the requisite standing to object before the Commission.

Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission, 556 N.E.2d 17 (Ind. Ct. App. 1990). Therefore, Petitions for Intervention of Shoup, W. Brackett,

Koremelink, Leggett, Jarrett, Traphagem, Miller, Newman, and Nance are denied.

12. Rogge, Eppler, Rupp, Bagbey, Padgett have also filed identical Petitions for Intervention and listed identical reasons as to how they will be adversely affected by the issuance of the permit at issue. These Petitions for Intervention, in relevant part, state:

Petitioner will be aggrieved or adversely affected by the Commission's action in that there is no need or desire in the community for the sale of alcohol at the Zeller's Master Tire location and it will have an adverse impact on other businesses and services in the neighborhood and community. The remonstrators submitted overwhelming and substantial evidence that the community does not desire the sale of alcohol at the location, that there is no need for the sale of alcohol at that location, and that the sale of alcohol at that location would have an adverse impact on law enforcement and be a detriment to the community and other business . . .

The proliferation of availability of alcohol will increase underage drinking. The issuance of a permit at the Master Tire location will have an adverse impact on the neighborhood, community and area businesses . . .

As a direct and proximate result of the applicant's (and other applicants) unlawful sale of beer and wine, petitioner and similarly situated persons and entities will sustain substantial, incalculable and irreparable damages.

(Petitions for Intervention of Rogge, Eppler, Rupp, Bagbey, and Padgett, collectively at pp.3-4).

13. 905 IAC 1-36-2(d) states, in relevant part, that in determining whether to permit a remonstrator to intervene, "the commission shall consider whether the remonstrator has proven that he or she will be personally aggrieved or adversely affected if the application for permit is granted." The remonstrator "must show a direct injury" and meet the "aggrieved or adversely affected requirement" to attain standing as an intervening remonstrator. *Ind. Ass'n of Beverage Retailers, Inc. v. Ind. Alcohol & Tobacco Comm'n*, 836 N.E.2d 255 (Ind. 2005).

14. "[T]he concept of 'aggrieved' is more than a feeling of concern or disagreement with a policy; rather, it is a personalized harm." *Huffman v. Ind. Off. Of Environmental Adjudication*, 811 N.E.2d 806, 812 (Ind. 2004).

15. Rogge, Eppler, Rupp, Bagbey, and Padgett stated that the community as a whole will incur harm from the impact of alcohol sales. (Petitions for Intervention of Rogge, Eppler, Rupp, Bagbey, and Padgett, collectively p.3-4). However, they offered no evidence demonstrating to the Commission how each remonstrator will be *personally* aggrieved or adversely affected to attain standing as an intervening remonstrator. (Emphasis added) (*Id.*). Thus, Petitions for Intervention of Rogge, Eppler, Rupp, Bagbey, and Padgett are denied since they have failed to satisfy a substantive requirement of law.

16. Lockard, in his Petition for Intervention, stated the following reasons as to how he will be aggrieved by the issuance of this permit:

You also have the testimony and word by way of resolutions from a variety of neighborhood associations, including a letter from the United Neighborhoods of Evansville, which represents over 60 neighborhood associations, against this type of permit. Again, a voice from the community that “the community does not want this.” . . .

I live very close to this area, and drive it multiple times per day back and forth to work and home. I pass by this location every day, and there is no need for a new permit of this type . . .

Petitioner will be aggrieved or adversely affected by the Commission’s action in that there is no need or desire in the community for the sale of alcohol at the Zeller’s Master Tire location and it will have an adverse impact on other businesses and services in the neighborhood and community

(Lockard’s Petition for Intervention at p.4).

17. Although Lockard stated that he lives “very close to this area,” thereby indicating that he may be, in some way, affected by this matter, he did not show how he would be injured in any way by the issuance of this permit. (*Id.*). Therefore, Lockard’s Petition for Intervention is denied since he has failed to satisfy a substantive requirement of law.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the Petitions for Intervention as Remonstrator, Objections to Commission's Action and Request for Appeal Hearing of Billie J. Gonterman, Melbern M. Borst, Cindy Brackett, June Beldon Jones, Kenneth C. Shoup, Robert D. Rogge, William Brackett, Michael H. Eppler, Jenny Kormelink, Mamie Leggett, Robert L. Jarrett, Heath Rupp, Keith Traphagem, Steve Bagbey, Fred Padgett, Fred Miller, Kirk Newman, Mark Nance, Deloris Koch, Jackie Williams, Niki Angelabi, Dee Lewis, Vicki Wright, Jennifer Hall, Donna Lilly and Michael Lockard, are DENIED.

DATED: _____

U-Jung Choe, Hearing Judge
Indiana Alcohol & Tobacco Commission